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No. 68416-7-I

Skagit County Superior Court No. 10-2-00587-3

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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Edward M. Goodman and Bernice S. Goodman, husband and wife,

Plaintiff/Respondent,

v.

Michael J. Goodman and Mary F. Goodman, husband and wife,

Defendant/Appellants.

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# RESPONDENTS' BRIEF

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C. Thomas Moser, WSBA #7287
Attorney at Law
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900


ORIGINAL

## TABLE OF CONTENTS

A. INTRODUCTION ........ 1

B. STATEMENT OF THE CASE ........ 2

C. RESPONSE TO APPELLANTS' MOTION IN BRIEF ........ 4

1. RESPONSE TO ASSIGNMENT OF ERROR NO. 1 ........ 9

2. RESPONSE TO ASSIGNMENT OF ERROR NO. 2 ........ 17

3. RESPONSE TO ASSIGNMENT OF ERROR NO. 3 ........ 19

4. RESPONSE TO ASSIGNMENT OF ERROR NO. 4 ........ 22

D. ATTORNEY FEES AND EXPENSES ........ 27

E. MOTION TO STRIKE PORTIONS OF APPELLANTS' BRIEF ... 28

F. CONCLUSION ........ 28

# TABLE OF AUTHORITIES

## Cases

*Bailey v. Hennessey*, 112 Wash. 45, 48, 191 P. 2s. 863 (1920)................ 16

*Berlin v. Robbins*, 180 Wash. 176, 38 P.2d 1047 ............................... 17, 18

*Evich v. Kovacevich*, 33 Wash.2d 151, 156, 204 P.2d 839 (1949)........... 17

*Hubbard v. Grandquist*, 191 Wash. 442, 71 P.2d 410.............................. 18

*Hellberg v. Coffin Sheep Co.*, 66 Wash.2d 664, 667-668, 404 P.2d 770, 773 (1965)........................................................................................ 16

*Rogers v. Cation*, 9 Wash.2d 369, 115 P.2d 702 (1941)........................... 17

*Seattle-First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 240, 588 P.2d 1308 (1978)................................................................... 8

*Smith v. Shannon*, 100 Wash. 2d 26, 37, 666 P.2d 351, 358 (1983)........... 8

*Thorndike v. Hesperian Orchards, Inc.*, 54 Wash. 2d 570, 575, 343 P.2d 183, 186 (1959)......................................................................... 26

*White v. Berg*, 19 Wash.2d 284, 142 P.2d 260 (1943)............................... 17

## Statutes

RCW 90.58 ....................................................................................... 8

## Rules

RAP 10.7.......................................................................................... 28

RAP 18.1.......................................................................................... 27

RAP 2.5(a) ........................................................................................ 8

**Treatises**

14A *Wash. Prac.*, Civil Procedure § 33:17 (2d ed.) .................................. 26

17 *Washington Practice*, Real Estate – Property Law and Transactions, Chapter 2 Easements and Profits ............................................................ 21

## APPENDIX


| | |
|---|---|
| 1 | Order to Dismiss Joined/Third Party Defendants |
| 2 | Order Denying Defendants' Motion to Supersede Judgment Entered on January 18, 2012 (RAP 8.1) |
| 3 | Complaint Form – Commission on Judicial Conduct |

## A. INTRODUCTION

This case was bifurcated by court order. The Plaintiffs' original Complaint was filed on March 26, 2010 as a quiet title and declaratory judgment action against Defendants, based upon a dispute over the use of an easement for septic system and shared driveway. CP 414-418. The court issued a Temporary Restraining Order to maintain the status quo pending trial.

On April 13, 2010 a First Amended Complaint (CP 400-405) was filed that included Defendants' and their two sons, based on malicious mischief for destruction of Plaintiffs' septic system and vandalism. The court entered Temporary Restraining Orders against all four defendants. CP 443-444.

On May 27, 2010 a Second Amended Complaint (CP 497-504) was filed by Plaintiffs based upon the physical assault on Plaintiff Edward Goodman by Defendants Chance and Tyson Goodman, and a lock-out barrier and ditch across the shared driveway installed by Defendants to prevent Plaintiffs from ingress and egress to their family home. The court issued a Preliminary Injunction order on June 3, 2010. CP 527-529.

Defendant Tyson Goodman filed a motion to stay discovery on the personal injury and property damage claims and bifurcate the case. CP

550. The motion was joined in by other Defendants and was based upon a felony criminal Information filed against Chance and Tyson Goodman for the assault on Edward Goodman and the process server. On July 15, 2010 the Court issued an order staying discovery and bifurcating the case, allowing discovery only on the quiet title and declaratory judgment claims. CP 554. Therefore the trial and decisions of the court that are now on appeal are only as to the quiet title and declaratory judgment actions.

## B. STATEMENT OF THE CASE

This case involves a real property dispute between family members. Edward Goodman and Michael Goodman are brothers. CP 507-526, Finding 3. The subject real property is adjacent to Lake Campbell in rural Skagit County and originally consisted of 26 acres. CP 507-526, Findings 1 and 2. In 1977 the property was conveyed to Plaintiffs Edward and Bernice Goodman by Ruth Goodman, mother of Edward and Michael. CP 507-526, Finding 11. In 1979 the brothers shared the expense of hiring a surveyor to short plat the 26 acres and four lots were created. CP 507-526, Findings 15 and 16. The brothers shared the expense of building a road to the undeveloped portion of the property from the County road with the intention that it would provide access to future home sites and the lake front. CP 507-526, Findings 29, 31 and 32. A portion of the road was

paved in 1979 and became the first vehicle access to the interior of the subject property. CP 507-526, Findings 34 and 35.

After the road was completed Edward Goodman placed a trailer at the top of the hill where he planned to one day build a home. CP 507-526, Findings 37. The short plat was completed in 1980. CP 507-526, Finding 21.

The brothers agreed that whoever started home construction first would have his choice of lots. Defendant Michael Goodman started construction first and selected Lot 2, which Plaintiffs conveyed to Michael and Mary Goodman by quit claim deed in 1980 as a gift. CP 507-526, Findings 22 and 41. The deed contained no express easement, but there was a notation on the plat map providing for an easement over lot 2 for benefit of lot 3, which was owned by Edward Goodman. CP 507-526, Findings 23, 24 and 42. The road became a shared driveway and is the only practical or feasible access to Lot 3, which is the lot owned by Edward and Bernice Goodman. CP 507-526, Findings 52 and 53.

Edward Goodman installed a septic tank and drain field on Lot 2, which was approved by the County in 1979. The location of the septic system is shown on the short plat. CP 507-526, Findings 68, 69 and 74. The septic system was installed on Lot 2 (Michael's lot) because Lot 3 (Edward's lot) is on a big rock and did not perc. CP 507-526, Findings 70.

Edward and Bernice paid the cost of installing the septic system. CP 507-526, Finding 72.

The brothers worked together to install utilities in and adjacent to the shared driveway. They shared these costs, except the cost of the septic line which was paid by Edward Goodman. CP 507-526, Finding 71. The septic system was connected to a trailer that Edward parked on Lot 2 until he built a home on the lot in 1991. CP 507-526, Finding 80.

The two families, including wives and children, peacefully co-existed on Lots 2 and 3 until March 2010, when Michael Goodman began to investigate building an accessory dwelling unit on Lot 2. Michael confronted his brother while he was inspecting his septic system adjacent to the shared driveway. CP 507-526, Findings 85 and 86. The confrontation started the litigation between the parties and the issuance of a temporary restraining order against Michael and Mary Goodman and their adult sons. CP 507-526, Findings 87 and 88.

### C. RESPONSE TO APPELLANTS' MOTION IN BRIEF

Appellants allege fraud committed in 1993 by recording of an easement on Defendants' property. It is alleged that the document was fraudulent and therefore Plaintiffs do not have clean hands. The second

allegation in the motion is that the shared driveway is in violation of the Shoreline Management Act.

1) Fraud: The document was signed before a notary public by Michael Goodman in 1980 and was prepared by Edward Goodman. RP 78. The document, Exhibit 18, is a purported easement that was defective for a number of reasons and was not the basis for the Court's decision. In fact the Court entered an order quashing the easement, by agreement of the parties, on November 23, 2011. CP 180-183.

Plaintiff Edward Goodman is a retired law enforcement officer. RP 48-49. He prepared the document, Exhibit 18, thinking it would protect his brother and it was signed at the same time as the quit claim deed transferring Lot 2 to Appellants. Plaintiff Edward Goodman testified about Exhibit 18 as follows:

> Q. So did Mike pick Lot 2?
> A. Yes, Mike picked Lot 2.
> Q. And what was the purpose of Exhibit 18, which is what you described as an easement?
> A. When we got together and discussed this, Mike says, well, if you sell your property, I don't want to have an easement through my property, and I thought, okay. We'll do that. It was supposed to be for us. So if I was to sell it, the party that bought it from me would not get that easement.
> Q. Who prepared Exhibit 17 which is the quitclaim deed.
> A. I did.
> Q. Where were you when you did this?

A. I believe I was at the Mount Vernon Police Department in the squad room.
Q. Was your brother, Mike, there?
A. Yes, he was.
Q. Why was he there?
A. We were in the process of giving him the property, and we had a person there that was a notary that we could have sign it.
Q. And the notary was who?
A. It was a Jacqueline Miller.

RP 77

Edward Goodman also explained that the deed and easement were signed at the same time before the same notary public. RP 79. He recorded it in 1993 because Michael Goodman "was having confrontations with the owners of Lot 1" of the short plat. RP 79. Edward Goodman explained that page 2 of Exhibit 18 was not part of the document when it was signed, but was later drawn by him at the request of a deputy Auditor (who he identified as a clerk) before recording. He did not know that page 2 of the document was going to be recorded:

Q. And you testified yesterday that Page 2 of Exhibit 18, the hand-drawn part, was done because the county said this is too vague. We don't know where this is. Draw it in for us, correct?
A. There was a question when I was reading about existing roadway, the clerk says, existing roadway? Where is that? She got a copy of this. At that time I took a pencil and drew it in for illustration purposes the roadway that was in place. At that time she took both the -- I didn't know at the time she was filing No. 2. It was just Page 1 that I was interested in.

Q. Okay. So you don't dispute that it's hand drawn?
A. No, I do not, and I did it.
Q. And you're not testifying that that's precisely accurate, what you hand drew on Page 12 of Exhibit 18?
A. It's not to scale.

RP 152-153.

The decision made by the trial judge in this matter was independent of Exhibit 18, which was a defective instrument for conveying an easement. There is no basis for this Court to determine that anything done with recording was fraudulent. In addition, Appellant presents no legal authority to demonstrate fraud and no authority for the trial court to do anything other than ignore the document.

After Plaintiffs rested, Defendants brought motions to dismiss Plaintiffs' case entirely. The trial court granted the motion to dismiss the express easement, stating:

> THE COURT: The motion to dismiss the express easement claim is granted. The motion to dismiss the remainder theories is denied.
> Ready to proceed, Mr. Butler?
>
> RP 184

Appellants also claim their property is "clouded" by the recording of the document. That claim was not made by Defendants at the trial court level, was not in the pleadings and should not now be considered by this

Court. RAP 2.5(a) . This court stated in *Smith v. Shannon*, 100 Wash. 2d 26, 666 P.2d 351 (1983):

> Failure to raise an issue before the trial court generally precludes a party from raising it on appeal. *Seattle-First Nat'l Bank v. Shoreline Concrete Co.,* 91 Wash.2d 230, 240, 588 P.2d 1308 (1978); RAP 2.5(a).
>
> *Smith v. Shannon*, 100 Wash. 2d 26, 37, 666 P.2d 351, 358 (1983)

Appellants are unable to demonstrate that there is any exception to the rule which will allow this Court to consider a claim of error not raised at the trial court.

2) Shoreline Management Act: Appellants also ask that this Court "deny any equitable relief to Respondents" based on alleged violation of the Shoreline Management Act, RCW 90.58. This theory was never before the trial court. Appellants do not cite either the trial transcript or pleadings to attempt to demonstrate this was an issue below.

Appellants seem to believe that any road, driveway or trail that is within 200 feet of a shoreline, whenever it was originally constructed is illegal. Again, there is no authority for this proposition and it was not an issue in the quiet title or declaratory judgment action below. RAP 2.5(a). The Shoreline Management Act was not plead by Defendants and was not an issue before the trial court.

Appellants are unable to demonstrate that there is any exception to the rule which will allow this Court to consider a claim of error not raised at the trial court.

**1. RESPONSE TO ASSIGNMENT OF ERROR NO. 1**

Appellants' first assignment of error is to Conclusions of Law 1 and 6. Conclusion of Law number 1 states:

> *Prior to 1980, Lots 2 and 3 were owned by Edward and Bernice Goodman and thus there was unity of title.*

In the Issues Pertaining To Assignment Of Error, Appellants discuss Lots 1 and 3, which is not what Conclusion of Law number 1 is about. The trial court simply concluded, based on the evidence, that Plaintiff at one time owned both subject Lots 2 and 3. Appellants cite no evidence in the record to contradict or raise any issue about whether in fact or in law both lots 2 and 3 were owned by Plaintiffs. Exhibit 1 is the deed from Ruth Goodman to Plaintiffs, which included the entire 26 acres before it was a short plat. Conclusion of Law number 1 is based on Finding of Fact number 11, which states that Ruth Goodman conveyed the entire 26 acres to Plaintiffs in 1977.

It appears that Appellants are referencing lots 1 and 3 of a subsequent short plat, SP 61-89, which was before the trial court as a dispute between the parties. There was an abortive attempt by Appellants

to include the owners of the four lots in SP 61-89 and they were served with a motion to join them as parties. The lot owners filed a Stipulation (CP 1-9) that they had no claims against the Goodmans and had no claim that Goodman Lane could not be used by either Goodman family. The joined parties were dismissed by order entered January 18, 2012[1].

Conclusion of Law number 6 states:

> *An easement implied from prior use has been established by the Plaintiffs as to the roadway constructed in 1979, including Goodman Lane and the roadway down to and across the lake front of Lot 2, and as to the septic system installed as described on page 5 of Exhibit 20.*

Appellants argue that it was error for the trial court to find that the road was built in 1979 because "evidence admitted by Ed was incompetent" and an aerial photo showed no road existed before 1980 (Appellants' Brief, page 5). The argument is that since Plaintiffs did not live on the property until they built their home on Lot 3 in 1991, there could be no implied easement. The testimony at trial was that Plaintiffs used their property for recreational purposes after the shared driveway was constructed. They had electrical power installed adjacent to the shared driveway to a mini pad where they parked a travel trailer.

> Q. Handing you what's been marked as Exhibit 14, which looks like it's three different pieces of paper stapled together. Can you tell us about

[1] Appendix 1. This document will be designated for Clerk's Papers by counsel before this matter is considered by this Court.

that?

A. Yes. The check was written by me August 17, 1979 for $522 for the power cable that ran up to the mini pad. The second page is the drawing that Puget Power put together and shows the power line from Campbell Lake Road to my mini pad and to Mike's mini pad and shows the route that the power line took. The third page is the easement for underground electrical service that I and my wife signed on August 9th, 1979.

RP 72

Edward Goodman further testified about the frequency of use of Lot 3 prior to construction of their family home.

Q. How often do you use the shared driveway that goes from your house down Lot 2 to your beach front property? When I say how often, give us an average in a period of time, per year, per month?

A. Boy, Tom, that's a tough one. It depends on the weather, depends on the season. We don't use it every day. Some days we might use it five or six times. If the kids are here, we use it regularly. I'm going to say three times a week, on an average, if you can get it all year round We also have service trucks going down there. I have a pump down there and we have a chemical toilet down there that we have to -- Wizard of Ooze go down at least once, sometimes twice a year to pump.

RP 111.

Edward Goodman also testified about paving of a portion of the shared driveway:

Q. Mr. Goodman, you testified yesterday that part of the shared driveway up to your house is paved?

A. Yes, I did.
Q. And why was it paved as opposed to leaving it unpaved like the other part of the road?
A. The slop was shell rock. Driving a car up there your wheels would spin. And also, the fire department required that we have some way to make sure firemen could get up there. The fire chief in the area actually paved it, drove the fire truck up and around the circular driveway, then down to Mike's when it was paved because he needed to get in and out.
Q. Is it paved part of the way down to the lake also?
A. No, it is not.

RP 119-120

Edward Goodman testified that the shared driveway was built in 1979 as a joint-effort between the brothers who also shared the expense of construction:

Q. When you got the property Goodman Lane didn't exist, is that right?
A. No, it did not.
Q. So who -- describe for the Court how that road was opened up, who paid for it -- what was involved to make that road exist?
A. Okay. From Campbell Lake Road to the entrance on to Lot 2 was done second. From Lot 2, going from there up to Lot 3 and down to the lake was done in roughly 1979, late part of 1979 by Craig Construction. My brother and I hired Craig Construction, and we had a large Cat that came in and bulldozed the road. And I remember that because we were paying $60 an hour. And we were just joking about it cost us a dollar a minute for this Cat to run.

RP 56

To supplement the Plaintiff's testimony several exhibits were admitted into evidence which further supported the testimony that the shared driveway was constructed in 1979. Exhibits 4 through 11.

The opening of the interior of the parcel of land that had been in the Goodman family for two generations was a special occasion because no vehicles had been able to access the property before the road was constructed. To mark the occasion Ruth Goodman and her grandson Troy made a sign that read "Road To Dreams" and a photograph was taken at the top of the hill in 1979 after the paving project was completed. Edward Goodman testified about the photograph taken by his mother:

> Q. Handing you what's been marked as Exhibit 11. Can you identify that, please.
>
> A. Yes, I can. This was a Polaroid picture taken by my mother as we were at the bottom of this hill right here going up. We had just paved the road. Valley Paving had come over. We had to wait overnight to drive on it. My older son, Troy stayed overnight with his grandmother, and we came the next day to drive up the road. She and Troy had got together and made this sign that said "Road to Dreams".
>
> Q. What was the purpose of calling it Road to Dreams?
>
> A. Well, this was our dream, to have this road to go up here and have access to the property.
>
> MR. MOSER: Offer 11.
>
> MR. BUTLER: The year again?
>
> THE WITNESS: 1979, just after we had it paved.
>
> MR. BUTLER: So this date is correct?

THE WITNESS: It is correct.
MR. BUTLER: No objection, your Honor.
MR. MOSER: I'm sorry.
THE COURT: 11 is admitted.

RP 66-67

The date of the paving of the Road To Dreams was verified by the contract with the paving company dated 1979:

Q. Mr. Goodman, I'm handing you what's been marked as Exhibit 13. Can you please identify that.
A. Yes. This is the contract written up by Valley Paving for the paving that occurred in 1979.
MR. MOSER: Offer 13, your Honor.
MR. BUTLER: No objection.
THE COURT: 13 is admitted.

RP 71

Edward Goodman also testified and provided documentation that the road was constructed in 1979 with a check he wrote to the power company for a power cable. Exhibit 14. He testified about hardware purchased in 1979 for electrical conduit for installation of electrical power to his property. Exhibit 15.

In addition to the road construction Plaintiffs installed a septic system in 1979 on Defendants' property which was designed to serve Plaintiffs' Lot 3. Plaintiffs parked a trailer on Lot 3 and connected it to the septic system in 1982:

Q. And you were connected to the septic system?
A. That's correct. We connected to it in about

1982.

Q. But you installed it in 1979?

A. That's correct.

Q. Handing you what's been marked as Exhibit 19. Can you identify that document, please.

A. The first page is an invoice with the name Ted Hansen stamped on it, with my name, that says two and a half hours backhoe rental, septic tank and drain field. It shows that I paid on 5/15/79 for a for a sewage permit, drain field and tank in the amount of 1483.26.

RP 81

Edward Goodman supplemented this testimony with copies of invoices and checks for the septic system that were all dated 1979. Exhibits 19 and 20.

It was also pointed out by Edward Goodman, on cross examination, that in 1979 he owned the entire parcel of property, including Lots 2 and 3 where the brothers now reside.

Q. I also want to make sure we're clear from your testimony with Mr. Moser. There was at no time permission sought by you to use Goodman Lane and the driveway from Mike, correct?

A. In 1979 I owned the property.

Q. Correct.

A. At that time it was being developed by Mike and I. We developed a roadway the entire way with the understanding that this was a shared driveway to be used for the owners of Lots 2 and 3, and that was my understanding. There was never any doubt in my mind that there would be asked for permission.

RP 126

**Implied Easement Theory:** The law in Washington recognizes easements by implication. The subject property was conveyed by a common grantor, which is one of the elements of easement by implication. The common law in Washington concerning easement by implication was stated by our Supreme Court in *Hellberg v. Coffin Sheep Co.*, 66 Wash.2d 664, 667-668, 404 P.2d 770, 773 (1965), as follows:

> Concerning easement by implication as appurtenances to land, this court has said (*Bailey v. Hennessey*, 112 Wash. 45, 48, 191 P. 863 (1920)):
>
> > Easements by implication arise where property has been held in a unified title, and during such time an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part, and such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, has been in use and is reasonably necessary for the fair enjoyment of the portion benefited by such use. The rule then is that upon such severance there arises, by implication of law, a grant of the right to continue such use.
>
> The foregoing quotation was reiterated in *Rogers v. Cation*, 9 Wash.2d 369, 115 P.2d 702 (1941); *White v. Berg*, 19 Wash.2d 284, 142 P.2d 260 (1943), and *Evich v. Kovacevich*, 33 Wash.2d 151, 156, 204 P.2d 839 (1949). In the latter case we said:
>
> > The essentials to the creation of an easement by implication are, as variously stated by this court, the following: (1) A former unity of title, during which time the right of permanent user was, by obvious and manifest use, impressed upon one part of the estate in favor of another part; (2) a separation by a grant of the dominant tenement; and (3) a reasonable

> necessity for the easement in order to secure and maintain the quiet enjoyment of the dominant estate. *Bailey v. Hennessey*, supra; Berlin v. Robbins, 180 Wash. 176, 38 P.2d 1047; *Hubbard v. Grandquist*, 191 Wash. 442, 71 P.2d 410.

There was former unity of title for the Goodman property, with a shared driveway installed before the property was subdivided. Plaintiffs obviously created the easement for the common benefit and use of future property owners in anticipation that the driveway would be shared. The subservient estate was granted to Defendants and that separation of the parcels made the Plaintiffs' property the dominant estate. Thus, an easement by implication was created.

### 2. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

Appellants' second assignment of error is to Conclusions of Law number 4, which states:

*The usage was apparent.*

This Conclusion follows a Conclusion of Law number 3 which stated that the shared driveway was in usage before Plaintiffs conveyed Lot 2 to Defendants. Conclusion 3 is not an assigned error by Defendants. The trial court determined that the usage of the shared driveway was apparent, meaning that it was known to Defendants that the road was open and being used at the time Plaintiffs gifted Lot 2 to Defendants.

A. We shared the cost. I just remember so vividly. I called Craig Construction brought them over. We met, I believe we've admitted a picture of us walking up and down the lane before the construction started, myself, Chuck Craig, and this was his first job that he ever did, his dad allowed him to do alone, and Mike and my son, Troy was behind me. We discussed it, where we were going to go, the cost, $60 an hour. He brought it in and we did split the cost.

RP 267

There simply is no evidence in the record to challenge the trial court's conclusion that the usage of the shared driveway was apparent. It was apparent to both parties and anybody who came to visit either family.

### 3. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

Appellants' third assignment of error is to Conclusion of Law number 5, which states:

*The usage was reasonably necessary.*

One of the witnesses called by Plaintiffs was Joe Goodman, the eldest of the three Goodman sons, who testified about how excited his mother was that the shared driveway to the top of the hill on the family farm had been completed. He testified that the road built by his brothers was the only way to get to the top of the hill, which he called "top of the old farm."

Q. Had that road been something discussed in the family for some years?

A. For many years, even as kids we discussed as that being the only basic, the only route to get up on top of the old farm.

RP 27

Appellants state that the trial court failed to compare the injury between the parties and failed to apply the "test of necessity." It is further stated that "with the 35' building setback makes it impossible for Mike to build." Appellants' Brief, page 8. There is no citation to the record to support Defendants' assertion. The argument also ignores the fact that the shared driveway continues to exist and did exist in the absence of a court order for three decades before this litigation was filed; and will exist as Defendants' only access to their home. The decision to build the road was a joint decision between the parties and the location was dictated by the terrain. CP 507-526, Findings 52, 53, 62, 63.

Appellant also argues that "Appraiser Dan Hewitt found the damage to Mike's Lot 2 so extensive he had no frame of reference. CP 336. The appraiser was not a witness at trial. The only reference to the appraiser was post-trial and is a hearsay statement in Defendants Reply To Plaintiffs' Response To Supersedes Judgment Entered On January 18, 2012. The motion was denied by order entered February 15, 2012[2]. This hearsay statement was not admitted into evidence, is not in the trial

[2] Appendix 2. This document will be designated for Clerk's Papers by counsel before this matter is considered by this Court.

transcript and even if offered would have been irrelevant because the issue was whether Plaintiffs had a right to use the driveway they had been sharing with Defendants since the time it was constructed in 1979. The impact on the fair market value of either property was not before the trial court.

The trial judge quoted Washington Practice with regard to the issue of "necessary" during closing argument and asked Defendants' counsel if he thought the treatise was persuasive:

> THE COURT: I don't know whether you find that the Washington Practice Property Law desk book is persuasive on this, but there is a lengthy discussion of the definition of necessary in Washington law. I'm going to read to you a pertinent part here, "A serious issue in the law of implied easements is what necessary means. Some American decisions tending to be the older ones insisted upon strict necessity. For example, the land would be landlocked without the claimed implied easement of access. Washington, along with most Courts today, has said many times that only reasonable necessity be shown. A fair statement of Washington's definition of necessary is that it does not mean strict necessity but only that other possible routes of use would be substantially less convenient, which might mean more expensive to develop and use." Isn't that the definition of necessity that we are working with here?
>
> RP 294-295

It appears the trial judge was reading from 17 *Washington Practice*, Real Estate – Property Law and Transactions, Chapter 2 Easements and Profits.

Appellants argue that an expert witness concluded that no road existed in 1979. CP 111-120. There was no testimony at trial from this witness. The declaration dated August 30, 2011 was filed on November 18, 2011 several months after trial and after the trial judge issued a letter decision. This Court should not consider references to the record that were not before the trial court. RAP 2.5(a) The declaration was submitted in conjunction with an objection by Appellants made to a proposed order. It was not before the trial judge at the time of trial and was submitted after the trial court's letter decision.

**4. RESPONSE TO ASSIGNMENT OF ERROR NO. 4**

This assignment of error follows the earlier assignments of error and involves the issue of when the road on Defendant's property was built. Finding of Fact Number 36 states:

> *The road built in 1979 included Goodman Lane, the paved driveway up to Lot 3, the driveway south downhill on Lot 2 to the beach area (portions of which were paved) and the access to Lot 3 along the edge of Lake Campbell. The construction of the road was completed before the short plat was approved by the County.*

Defendant Michael Goodman insists that the shared driveway was constructed in 1986, not 1979. He insisted that the bulldozers in the photographs belonged to him. However, when shown photographs of the road construction that Plaintiffs took in 1979, Michael Goodman admitted

he was confused and changed his testimony about who owned the bulldozers. The Defendant's inconsistent testimony was as follows:

Q. Handing you what's been admitted as --
A. This, this, this right here, after this one before me on the 12th of March -- **I'm confused now.**
Q. Yeah. I can tell. Exhibits 4 and 5, your testimony, these are photographs that your brother or your brother's family took of the road construction. You testified that you've seen those before. Counsel asked you about them, correct?
A. Yes.
Q. And your testimony is that that's your bulldozer that's shown there?
A. You know this is my rented bulldozer that I had there.
Q. Rented?
A. Yes. My other bulldozer was parked down the lane.
Q. Also handing you Exhibits 6 and 7, same bulldozer shown there?
A. Yes, this is the TV 25.
Q. Are those all the same bulldozers?
A. All of these was hired specifically for this job.
Q. And it's true this is not your bulldozer?
A. This bulldozer is the one I rented for this job.
Q. Sir, it's not your bulldozer?
A. I did not own this particular bulldozer.
Q. Who is operating?
A. The son of the owner of Craig Construction.
Q. So you agree with your brother's testimony that Craig Construction was hired that day to put in that road with that bulldozer; is that correct?
A. Craig Construction was hired to take the rocks off the top of the hill and create a driveway down to my -- excavation on my property.
Q. And your brother testified that you and he contributed equally to having that road

constructed, isn't that correct?

A. No.

Q. What is correct?

A. It was -- all the pictures you see are on my property.

Q. Yes, sir.

A. And all the expenses of going in to putting this road in was mine.

Q. So your brother never contributed to the cost, is that your testimony?

A. Not that I'm aware of.

Q. Okay. So your testimony before lunch is not correct?

A. Maybe I misspoke and said it's the use of my bulldozer.

RP 230, 232 (Emphasis added)

Defendant submitted Exhibit 32 saying that the photo does not show the shared driveway going down to the lake front across Defendants' property and on to Plaintiffs' property. Edward Goodman testified about Exhibit 32 on cross-examination and pointed out the road to Defendant's counsel.

Q. Can you point out on Exhibit 32 where the road is that you said was there. Is that shown on Exhibit 32?

A. It sure is.

Q. Okay.

A. Right here. Here is the road. It goes right through the woods, right down here. Here, in fact, is the trailer we have parked here. Here is an old dock by the pump house that originally used. You can still see it's pretty brushy. We cleaning it at the time. This is the dock in this picture.

> Q. And you -- where your finger just went is the road that is pictured there, that clearing of Exhibit 37 you're saying is under those trees?
>
> A. Right. Those big cedar trees. Right, just right along here. You can see part of the road. We had a trailer down there off and on. This trailer now sits down here. This dock is gone.

RP 268

**Trial Court Findings Will Not Be Disturbed On Appeal:**

Appellants' assignments of error are to specific Conclusions of Law, but the arguments advanced and issues raised are about Findings of Fact. The underlying reason for this appeal is that Defendants are not happy with the Findings entered by the Court. This court has followed the rule in Washington that factual disputes resolved by a trial court will not be disturbed on appeal.

> The findings are amply sustained by the proofs. If we were of the opinion that the trial court should have resolved the factual dispute the other way, the constitution does not authorize this court to substitute its finding for that of the trial court. The judgment must be affirmed
>
> *Thorndike v. Hesperian Orchards, Inc.*, 54 Wash. 2d 570, 575, 343 P.2d 183, 186 (1959)

This proposition in the law has been repeatedly affirmed. The rule is well stated by Tegland in *Washington Practice*, Civil Procedure, citing the Thorndike, *supra*, holding as follows:

> In the event of an appeal, the appellate court normally defers to the trial courts findings. Theoretically the

appellate court has the authority to review factual determinations, but in the vast majority of cases, the trial court's findings will dictate the facts of the case as far as the appellate court is concerned.
In a civil case, the trial court's findings of fact will not be disturbed on appeal if they are supported by substantial evidence. The rule is based upon the notion that the trier of fact is in the best position to decide factual issues.

14A *Wash. Prac.*, Civil Procedure § 33:17 (2d ed.)

The trial court Findings that Appellants challenge in arguing the Assignments of Error and upon which the Conclusions of Law are based, include the following:

- The road constructed commenced in 1979 and started from the County road in the northwest corner of the Goodman property along the west property line, through what is now Goodman Lane. Findings 25, 26, 27 and 28.
- The brothers hired Craig Construction and shared the cost of construction and together picked the route to future home sites. They also shared the cost of paving and the road was completed in 1979. Findings 31, 32, 33 and 34.
- The road included Goodman Lane and went up to Lot 3 and down the hill to the beach on Lots 2 and 3 and Plaintiffs moved a trailer to Lot 3 before the short plat was completed. Findings 36 and 37.

- Before Lot 2 was conveyed to them, Defendants knew the road existed on Lot 2 and that Plaintiffs had a building site on Lot 3. Findings 37 and 38.

These findings are supported by substantial evidence and should not be disturbed on appeal.

### D. ATTORNEY FEES AND EXPENSES

Pursuant to RAP 18.1 this Court should award attorney fees and expense against Appellants. Respondents were prevailing party at the trial court and the trial judge found Respondents in contempt both before and after trial. After filing this appeal, Appellants have filed eleven (11) motions on issues that should never have been before this Court and, except for motions for extension of time, were all denied. This forced Respondents to have counsel travel to Seattle to argue at least one of the motions before the Commissioner.

Respondent Edward Goodman has often stated that he was told by Appellants that they would ruin his family financially by making this litigation as costly and as lengthy as possible. This frivolous appeal is a continuation of a pattern established even before trial. Appellants' co-defendant son filed a complaint against the trial judge before the

Commission On Judicial Conduct[3] and asked this Court to remove Respondent's counsel from this appeal. They have alleged fraud that is not based on facts. Pursuant to RAP 18.9(a) and principals of equity the Court should award attorney fees on appeal to Respondents.

## E. MOTION TO STRIKE PORTIONS OF APPELLANTS' BRIEF

Appellants have submitted elements within their brief that are not part of the record, or are not identified as part of the record:

Page 6; Diagram of road easement.

Page 12; entire page

These drawings are not part of the record of the trial proceedings and should not be considered by the court. This motion is pursuant to RAP 10.7.

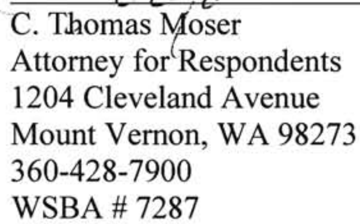
## F. CONCLUSION

The trial court carefully listened to the testimony, reviewed the evidence, conducted a site visit and made a reasoned decision based on the law. The Appellants' challenge to a Finding of Fact should not be disturbed on appeal. The trial court should be affirmed and this Court should award attorney fees and expenses to Respondents.

---

[3] Appendix 3. This document will be designated for Clerk's Papers by counsel before this matter is considered by this Court.

DATED this 15 day of November, 2012.



C. Thomas Moser
Attorney for Respondents
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900
WSBA # 7287

# APPENDIX 1

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2012 JAN 18 PM 3:03

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR SKAGIT COUNTY**

8

| | |
|---|---|
| EDWARD M. GOODMAN and BERNICE GOODMAN, husband and wife,<br><br>Plaintiffs,<br><br>vs.<br><br>MICHAEL J. GOODMAN and MARY F. GOODMAN, husband and wife, and CHANCE GOODMAN, a single man, and TYSON GOODMAN, a single man,<br><br>Defendants,<br>PETER BIRD, MARY KIRKWOOD and DAN RUE,<br><br>Third Party Defendants. | Cause No.: 10-2-00587-3<br><br>ORDER TO DISMISS JOINED/THIRD PARTY DEFENDANTS |

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20 THIS MATTER having come before the Court on the motion of the involuntary
21 third party Defendants, PETER BIRD, a single man, and DANIEL RUE and MARY
22 KIRKWOOD, husband and wife and the court having reviewed the files and records in
this cause including the stipulation of the parties requesting dismissal and the easements
23 signed by the parties consistent with their short plat lot ownership, now therefore,

24 IT IS HEREBY ORDERED, ADJUDGED and DECREED that the third party
25 defendants, PETER BIRD, DANIEL RUE and MARY KIRKWOOD shall be and they

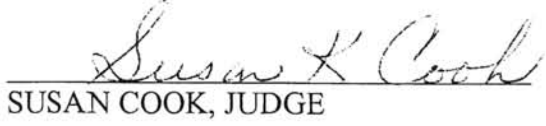


Jones & Smith
*Attorneys at Law*
415 Pine Street
P.O. Box 1245
Mount Vernon, WA 98273
(360) 336-6608

ORIGINAL

are hereby dismissed from the above entitled cause without prejudice and without an award of fees or costs at the litigation.

DATED this 18 day of ~~December 2011~~. January, 2012.



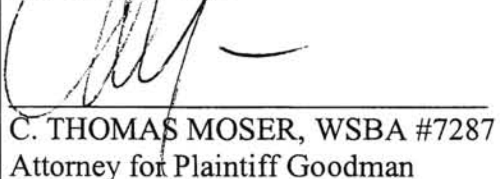
SUSAN COOK, JUDGE

Presented by:

JONES & SMITH

GARY T. JONES, WSBA #5217
Attorney for Kirkwood, Rue & Bird

Approved as to form
and copy received



C. THOMAS MOSER, WSBA #7287
Attorney for Plaintiff Goodman

WIECK SCHWANZ

______________________________

THOMAS LEE SCHWANZ, WSBA #
Attorney for Wayne Olsen

LAW OFFICE OF ANDREA BERNARDING

______________________________

KELLY M. MADIGAN, WSBA #
Attorney for Plaintiff Goodman



Jones & Smith
*Attorneys at Law*
415 Pine Street
P.O. Box 1245
Mount Vernon, WA 98273
(360) 336-6608

1 MICHAEL F. GOODMAN, pro se

2

3 MARY F. GOODMAN, pro se

4

5 TYSON GOODMAN, pro se

6

7 CHANCE GOODMAN, pro se

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Jones & Smith
*Attorneys at Law*
415 Pine Street
P.O. Box 1245
Mount Vernon, WA 98273
(360) 336-6608

# APPENDIX 2

FILED
SKAGIT COUNTY CLERK
SKAGIT COUNTY, WA

2012 FEB 15 AM 9:39

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

EDWARD M. GOODMAN and BERNICE S. GOODMAN, husband and wife,

Plaintiffs,

vs.

MICHAEL J. GOODMAN and MARY F. GOODMAN, husband and wife, and CHANCE GOODMAN, a single man, and TYSON GOODMAN, a single man

Defendants.

No: 10-2-00587-3

**ORDER DENYING DEFENDANTS' MOTION TO SUPERSEDE JUDGMENT ENTERRED ON JANUARY 18, 2012 (RAP 8.1)**

**THIS MATTER** having come before the court upon Defendant Michael and Mary Goodman's Motion to Supersede Judgment Entered on January 18, 2012 (RAP 8.1), the Defendants appearing pro se and the Plaintiffs being represented by attorney C. Thomas Moser, the court having listened to argument and having reviewed the pleadings, now makes the following:

**IT IS HEREBY ORDERED, AJUDGED, AND DECREED** that Defendant Michael and Mary Goodman's Motion to Supersede Judgment Entered on January 18, 2012 is denied.

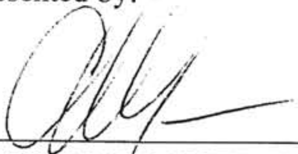


C. Thomas Moser, WSBA #7297
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900

Done In Open Court this 15 day of February, 2012

Susan K Cook
Judge

Presented by:



C. THOMAS MOSER, WSBA# 7287
Attorney for Plaintiff Goodman

Entry Approved by:

Legal decription on Judgment
Michael J. Goodman, pro se
Leaves off the Access For
Plaintiff Lot 3



C. Thomas Moser, WSBA #7297
1204 Cleveland Avenue
Mount Vernon, WA 98273
360-428-7900

# APPENDIX 3

# COMPLAINT FORM

STATE OF WASHINGTON
COMMISSION ON JUDICIAL CONDUCT
P.O. Box 1817 Olympia, WA 98507 (360) 753-4585 Fax (360) 586-2918

For Office Use Only

Inq.# __________

CONFIDENTIAL

This form is designed to provide the Commission with information required to make an initial evaluation of your complaint, and to begin an investigation of your allegations. Please read the accompanying materials on the Commission's function and procedures before you complete this form.

- **Materials filed in the Commission's confidential records cannot be duplicated for you.**
- **If you need to maintain a record, keep a copy.**
- **Do not send original records you wish to keep without making prior arrangements for their loan, safe delivery and return.**

**PLEASE TYPE OR PRINT ALL INFORMATION**

Your Name: Chance Goodman

Address: PO Box 1801

City: Anacortes State: WA Zip: 98221

Daytime telephone: 360-299-2239 Evening telephone: 360-299-2239

Name of Judge/Commissioner: Susan Cook

County: Skagit

Court level: ☐ Municipal ☐ District ☒ Superior ☐ Appeals ☐ Supreme

Case Name and Docket Number, if applicable: 10-2-00587-3

Attorneys involved: C. Thomas Moser, Chance Goodman pro se

If this complaint relates to a trial or other court proceeding, has it been or will it be appealed?

☒ Yes ☐ No ☐ Not applicable

Please provide a brief summary of the unethical actions or behaviors that you believe were committed by this judge or commissioner. (If you wish, you may refer to the Code of Judicial Conduct which you can find in the Washington Court Rules or on our website at www.cjc.state.wa.us.)

Bias, prejudice, against defendants. Judge Cook will not consider defendants argument or acknowledge facts or evidence of defendants.

Please list the dates of alleged misconduct: June 3, 2010 thru July 26, 2011.

**SUPPORTING FACTS:**

**Please state specific facts to support your allegation(s) of judicial misconduct. Include all pertinent dates, and name(s) of witnesses, if known. Attach copies of any documents which may support your position. You may attach additional pages if needed.**

Plaintiff's Edward & Bernice Goodman, Edward is former Sheriff of Skagit County 1995-2003, Judge Cook was elected in 1996 to current. Sheriff Goodman is a party in a lawsuit with Judge Cook 1996, cause no. C95-1360R, United States District Court. Judge Cook lives in same hometown of Anacortes as plaintiff Edward Goodman.

Judge Cook's son was in an altercation with defendant Tyson Goodman while they attended school.

Judge has bias for plaintiff's attorney as they have worked together.

Signed: Date: 8/12/2011

Send completed form to: Commission on Judicial Conduct, PO Box 1817, Olympia, WA 98507

Note: Due to confidentiality requirements complaints cannot be accepted via e-mail.

**[If you have a disability which requires assistance in filing a complaint or you would like this form in an alternate format, such as Braille, large print or audio tape, contact this office at (360) 753-4585 voice or TDD. We will take reasonable steps to accommodate your needs.]**

NO. 68416-7-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

EDWARD M. GOODMAN and )
BERNICE S. GOODMAN, husband )
and wife, )
)
Respondents, )
) DECLARATION OF
Vs. ) SERVICE
)
MICHAEL J. GOODMAN and )
MARY F. GOODMAN, husband )
and wife, )
Appellants. )
)

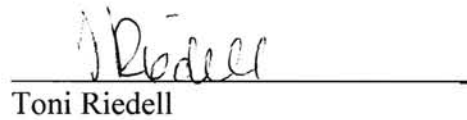
I certify under penalty of perjury under the laws of the state of Washington that I am over the age of eighteen years and not a party to this action. I certify that on November 28, 2012, I caused to be delivered, a copy of Respondents' Brief to the parties listed below, at their addresses of record on the date listed below.

Michael and Mary Goodman
13785 Goodman Lane
Anacortes, WA 98221

[X] First Class Mail
[ ] Email
[ ] Hand Delivery

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct and that this declaration was executed at Mount Vernon, Washington.

DATED this 28 day of November, 2012.



Toni Riedell